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12 UNITED STATES DISTRICT COURT
13
14 FOR THE CENTRAL DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,
16 Plaintiff,
17 v.
18 JOHN JACOB OLIVAS,
19 Defendant.

ED CR No. 18-231-JGB

GOVERNMENT'S OBJECTIONS TO
DEFENDANT JOHN JACOB OLIVAS'S
NOTICE OF MANUAL FILING OF IN
CAMERA DOCUMENTS; EXHIBIT

Hearing Date: N/A
Hearing Time: N/A
Location: Courtroom of the
Hon. Jesus G.
Bernal

22 Plaintiff United States of America, by and through its counsel
23 of record, the Acting United States Attorney for the Central District
24 of California, Assistant United States Attorneys Julius J. Nam and
25 Eli A. Alcaraz, hereby files these objections to defendant JOHN JACOB
26 OLIVAS's Notice of Manual Filing of *In Camera* Documents, filed on
27 April 9, 2021, at Docket No. 67.

28 This response is based upon the attached memorandum of points

1 and authorities, the attached exhibit, the files and records in this
2 case, and such further evidence and argument as the Court may permit.

3 Dated: April 15, 2021

Respectfully submitted,

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10 /s/

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 In 2011 and 2012, defendant John Jacob Olivas ("defendant") used
4 his position and power as a federal law enforcement agent to sexually
5 abuse two of his intimate partners, N.B. and K.L., and to prevent
6 them from reporting his sexual assaults, as well as other acts of
7 violence, to law enforcement. Defendant's abuse of his federal law
8 enforcement authority violated the victims' constitutional rights:
9 namely, their rights to liberty and bodily integrity. For three
10 specific sexual assaults of K.L. and N.B., defendant is charged with
11 three counts of deprivation of rights under color of law, in
12 violation of 18 U.S.C. § 242.

13 On April 9, 2021, defendant filed a notice of manual filing or
14 lodging in which the description provided was: "Notice of Manual
15 Filing of *In Camera* Documents." (Dkt. No. 67.) Despite an inquiry
16 to defendant's counsel regarding the nature of that filing, the
17 defense has not responded to government counsel as of the date of
18 this filing. Defendant made a similar filing on August 18, 2020,
19 which was titled "Notice of Manual Filing of *Ex Parte* Application to
20 File *In Camera*; Proposed Order in the Alternative, and In Camera
21 Documents." (Dkt. No. 57). After the government's inquiry into the
22 nature of that previous *in camera* filing also went unanswered, the
23 government filed an objection to the extent defendant's request was
24 for the issuance of a subpoena. (Dkt. No. 62.) The docket does not
25 reflect whether defendant's previous request was granted over the
26 government's objection.

27 Without any clarification to the contrary, the government again
28 must assume that the defense is seeking issuance of subpoenas under

1 Rule 17 of the Federal Rules of Criminal Procedure and that the
2 defense is asking for permission to do so while attempting to prevent
3 the government from being heard about the propriety of its requests.

4 The government again objects to the *in camera* nature of
5 defendant's filings and to the issuance of any subpoenas, unless the
6 government is afforded the opportunity to be heard on the validity of
7 these subpoena requests. It is not fair to deprive the government of
8 the opportunity to contest the defense's subpoena requests.

9 The government acknowledges that in the appropriate
10 circumstances a trial subpoena for records to third parties *could* be
11 appropriate under Rule 17. But without the opportunity to evaluate
12 particular subpoena requests, or the documents returned by the third
13 parties, the government is in the dark about what documents defendant
14 is seeking, or from whom. As a general matter, the government is
15 concerned that shutting it out of the process leading to the approval
16 of *in camera* subpoenas and the parties' review of the resulting
17 documents has the potential to unfairly prejudice the government.

18 Since the government has no idea what subpoenas the defense may
19 be seeking, the government does not categorically oppose all
20 *in camera* requests for Rule 17 subpoenas in this case. Instead, by
21 submission of this brief, the government seeks to provide some
22 background law to the Court regarding what is -- and what is not --
23 permitted by Rule 17, to submit for the Court's consideration orders
24 issued by other district judges in this district in comparable
25 situations, and to offer the Court the benefit of a walled-off
26 Assistant United States Attorney (a "taint AUSA") to represent the
27 government at every, or any, stage of the *in camera* process and the
28 return of documents.

1 **II. RULE 17 DOES NOT ALLOW "FISHING EXPEDITIONS" FOR**
2 **POTENTIAL IMPEACHMENT MATERIAL**

3 **A. General Requirements for a Rule 17(c) Subpoenas**

4 Rule 17 of the Federal Rule of Criminal Procedure provides for
5 the issuance of subpoenas to compel the testimony of witnesses at
6 criminal proceedings and the production of evidentiary documents.
7 Fed. R. Crim. P. 17. But a subpoena *duces tecum* issued under Rule 17
8 has a limited purpose: to procure evidence that will be introduced at
9 the attendant proceeding, usually trial. *United States v. Nixon*, 418
10 U.S. 683, 698-99 (1974).

11 In *Nixon*, the Supreme Court held that the proponent of the
12 subpoena must "clear three hurdles: (1) relevancy;
13 (2) admissibility; (3) specificity." *Nixon*, 418 U.S. at 699. As
14 courts have noted, the failure to show relevance, admissibility, and
15 specificity indicates the requested Rule 17 subpoena is an
16 impermissible fishing expedition. *See, e.g., United States v.*
17 *Noriega*, 764 F. Supp. 1480, 1493 (S.D. Fla. 1991) ("If the moving
18 party cannot reasonably specify the information contained or believed
19 to be contained in the documents sought but merely hopes that
20 something useful will turn up, this is a sure sign that the subpoena
21 is being misused.").

22 *Nixon* further provides that even upon a showing that the
23 subpoena seeks relevant, admissible, and specific evidence, a court
24 must also consider whether the materials are "(2) . . . not otherwise
25 procurable reasonably in advance of trial by exercise of due
26 diligence; (3) that the party cannot properly prepare for trial
27 without such production and inspection in advance of trial and that
28 the failure to obtain such inspection may tend unreasonably to delay

1 the trial; and (4) that the application is made in good faith and is
2 not intended as a general 'fishing expedition.'"

3 Rule 17(c) plainly requires a showing of relevancy,
4 admissibility, and specificity to support a subpoena for documents.
5 Further, Rule 17(c)(2) allows the Court to consider a motion to quash
6 if the subpoena is unreasonable or oppressive. Upon the filing of a
7 motion to quash, it is the defendant's burden to show the requested
8 documents are relevant, admissible, and that the request is
9 sufficiently specific. *Nixon*, 418 U.S. at 700. As fully discussed
10 below, defendant cannot meet his burden if the subpoena is for a
11 purpose beyond the scope of Rule 17: to gather "discovery"
12 information. If the subpoena is nothing more than a "fishing
13 expedition," it is unreasonable and oppressive and must be quashed.

14 **B. A Rule 17(c) Subpoena Cannot Be Used to Seek Discovery**

15 Courts have long held that, given the detailed rules set forth
16 in Rule 16 of the Federal Rules of Criminal Procedure ("Rule 16")
17 regarding the government's disclosure obligations before and during
18 trial, a defendant may not circumvent Rule 16 by seeking broader
19 discovery through the use of Rule 17(c) subpoenas to government
20 agencies. As the Supreme Court long ago made clear in *Bowman Dairy*
21 *Co. v. United States*, "[i]t was not intended by Rule 16 to give a
22 limited right of discovery, and then by Rule 17 to give a right of
23 discovery in the broadest terms. . . . Rule 17(c) was not intended
24 to provide an additional means of discovery." 341 U.S. 214, 220
25 (1951). As a result, Rule 17(c) subpoenas in general are not proper
26 if "intended as a general 'fishing expedition.'" *Nixon*, 418 U.S. at
27 700. "[Rule 17's] chief innovation was to expedite the trial by
28 providing a time and place before trial for the inspection of the

1 subpoenaed materials. *Bowman Dairy*, 341 U.S. at 220. Hence, any
2 attempt to justify the subpoena as a method in order to obtain
3 documents and objects "material to preparing the defense" pursuant to
4 Rule 16(a)(1)(E)(i), is to no avail.

5 The Ninth Circuit in *United States v. Reed*, 726 F.2d 570, 577
6 (9th Cir. 1984), determined the district court properly quashed a
7 Rule 17 subpoena where the defendant had sought entire arson
8 investigation files, not specific documents. The Ninth Circuit
9 stated "Rule 17(c) was not intended as a discovery device, or to
10 'allow a blind fishing expedition seeking unknown evidence.'" *Id.*
11 (citation omitted). That court also commented that the defendant did
12 not establish admissibility of the subpoenaed files.

13 Any subpoenas requested in this case, like the one in *Reed*, may
14 seek a large swath of documents (such as files maintained by the
15 California Department of Social Services for the victims in this
16 case), not specific records. If the subpoenas seek a large variety
17 of documents, it is unclear how such an array of documents would be
18 admissible. See *United States v. Richardson*, 607 F.3d 357, 368 (4th
19 Cir. 2010) ("The subpoena duces tecum is not intended to provide a
20 means of pretrial discovery.").

21 Defendant has the burden to establish admissibility of the
22 materials, the relevance of the materials sought by the subpoenas,
23 and that the subpoena request is a specific one. Failure to any one
24 of the elements specifically makes quashing the subpoenas
25 appropriate. Information in the possession, custody and control of
26 the government that falls under its *Brady* disclosure obligations is
27 not the type of material a Rule 17(c) subpoena was designed to reach.
28 See *United States v. Cuthbertson*, 651 F.2d 189, 195 (3d Cir. 1981).

1 **C. Defendant's Subpoenas Must Seek Only Relevant, Specific,**
2 **and Admissible Materials**

3 The following subsections offer some analysis on how the above
4 principles may apply to any *in camera* subpoena requests. The
5 government also offers as Exhibit 1 an order issued by another
6 district judge in the Central District when addressing an *in camera*
7 request for Rule 17 subpoenas in a criminal case.

8 In the event defendant requests Rule 17 subpoenas for documents,
9 the government submits that defendant must show that the documents
10 sought by his proposed *in camera* subpoenas are "(1) relevant; (2)
11 admissible; and (3) specific." *Nixon*, 418 U.S. at 699. Unless
12 defendant can make these showings, the Court should not authorize the
13 subpoenas.

14 To meet his burden, defendant cannot merely offer the defense's
15 hope that these subpoenas will lead to documents which the defense
16 can use on cross-examination or during the defense case. That would
17 not be enough. Similarly, if defendant seeks entire categories of
18 documents, such subpoenas would be defective as not sufficiently
19 specific.

20 **III. STANDING AND RULE 17 SUBPOENAS**

21 In the event any of the requested Rule 17 subpoenas are directed
22 to a federal agency, the government has standing to quash any such
23 subpoenas. The United States Attorney is the authorized
24 representative of the United States and has authority to quash
25 improper subpoenas issued to employees of the United States. See 28
26 U.S.C. § 516 ("[T]he conduct of litigation in which the United
27 States, an agency, or officer thereof is a party, or is interested
28 . . . is reserved to officers of the Department of Justice, under the

1 direction of the Attorney General."); Fed. R. Crim. P. 1(b)(1)(B)
2 ("‘Attorney for the government’ means . . . a United States attorney
3 or an authorized assistant.").

4 When a federal government employee, such as the General Counsel
5 for a government agency, is subpoenaed, the United States Attorney’s
6 Office is the appropriate entity to appear on behalf of the agency in
7 court. The role of the United States Attorney’s Office in this
8 regard has been recognized by the courts. See, e.g., *United States*
9 *v. Eden*, 659 F.2d 1376, 1381 (9th Cir. 1981) (allowing the
10 government, i.e., the U.S. Attorney’s Office, to move to quash a
11 defense subpoena served on the Department of Education); *United*
12 *States v. Raineri*, 670 F.2d 702, 712 (7th Cir. 1982) (recognizing the
13 government’s right to challenge defense subpoena to government
14 witness).

15 **IV. ALL SUBPOENAED DOCUMENTS SHOULD BE MADE AVAILABLE TO THE**
16 **GOVERNMENT**

17 Rule 17(c)(1) provides that the Court “may direct” the party
18 upon whom a Rule 17 subpoena is served to “produce the designated
19 items in court before trial or before they are to be offered in
20 evidence.” Assuming the Court authorizes the issuance of the Rule 17
21 subpoenas sought by defendant, and upon review of the produced items
22 finds that such materials have been obtained in compliance with Rule
23 17, the government would have no objection to early production of the
24 documents for dissemination to the defense at the time of the pre-
25 trial conference. But the government requests that *it also* be given
26 copies of all documents produced under any such subpoenas, under Rule
27 17(c)(1).
28

1 Providing such documents to the government would not reveal the
2 defense's litigation strategy. The government already knows that the
3 defense will seek to impeach its likely witnesses -- the victims of
4 defendant's sexual abuse. Keeping these documents from the
5 government would subject it and the witnesses to unfair surprises
6 during trial and would prevent the government from conducting follow-
7 up investigation to learn and present to the jury all relevant facts
8 surrounding any prior instances of alleged misconduct or dishonesty
9 by government witnesses.

10 **V. AVAILABILITY OF A TAINT AUSA TO REPRESENT THE UNITED STATES IN**
11 **IN CAMERA PROCEEDINGS**

12 If the Court is inclined to allow the defense to submit *in*
13 *camera* requests for Rule 17 subpoenas, then the government requests
14 that an AUSA who is not affiliated with the prosecution of this
15 matter -- and who would remained walled off from the trial team -- be
16 allowed to participate in the *in camera* litigation of this matter.
17 The taint AUSA would also be available to represent the government's
18 interests with respect to defendant's *in camera* requests for Rule 17
19 subpoenas and the Court's post-issuance consideration of whether the
20 produced documents may appropriately be produced to the parties under
21 Rule 17.

22 **VI. CONCLUSION**

23 The government respectfully objects to the *in camera* nature of
24 these requests. It also offers the above legal authorities and
25 analysis for the Court in its consideration of any *in camera* Rule 17
26 subpoena requests it may consider. Also, for the foregoing reasons,
27 the government respectfully requests that it be given copies of all
28 documents produced to the court in response to any such Rule 17

1 subpoenas and that a taint AUSA be permitted to represent the
2 government's interests in the *in camera* litigation as set forth
3 above.